

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS'
MOTION REGARDING SUMMARY JUDGMENT BRIEFING" [DKT #1823]**

Plaintiff, the State of Oklahoma ("the State"), respectfully request that "Defendants' Motion Regarding Summary Judgment Briefing" [DKT #1823] be denied and that the State's proposal regarding summary judgment briefing, *see* Exhibit A to Motion, be adopted.

I. Introductory statement

Under LCvR 56.1(a), the 12 Defendants and the State would each be entitled to a single 25-page motion for summary judgment, and each motion would have to cover the entire range of issues that that party desired to raise on summary judgment. Given the nature of this case, the State agrees that efficient case management supports variance from LCvR 56.1(a). The State's proposal regarding summary judgment briefing, however, is far superior to Defendants' proposal. While Defendants' proposal would bury the Court and the State under a rolling avalanche of paper -- up to *960 pages* of briefing with respect to Defendants' motions alone -- over the course of the next several months, the State's proposal would require the two sides to discipline themselves and focus their respective motions on issues that might truly be appropriate for Rule 56 treatment.

II. The competing proposals

A. Defendants' proposal

Defendants have made the following proposal regarding the handling of motions for summary judgment in this case:

- Up to 9 joint common issues motions for summary judgment by Defendants
- Up to 7 Defendant-specific motions for summary judgment
- Page length regarding each motion for summary judgment, response and reply per LCvR 7.2
- Time regarding responses and replies to motions for summary judgment per LCvR 7.2
- Rolling filing of motions for summary judgment up to May 18, 2009
- "[S]ingle, reasonably sized summary judgment motion" by the State¹

In short, Defendants' proposal would result in up to 960 pages of briefing with respect to Defendants' motions alone.² Such briefing would occur on a rolling basis over the next several months, a time when the two sides' resources are committed to completing fact and expert discovery. Notably, Defendants' proposal contemplates piece-meal treatment of the issues, requiring multiple hearings and rulings by the Court over the next several months as Defendants' motions roll in. Finally, Defendants' proposal would unfairly provide Defendants nine times more briefing on common issues than that provided to the State.

B. The State's proposal

¹ Up until now Defendants have referred to the State in the plural (i.e., as "Plaintiffs" not "Plaintiff").

² Applying LCvR 7.2, a briefing cycle on a motion comprises up to 60 pages (25 for the motion, 25 for the response, and 10 for the reply). Sixteen motions at 60 pages apiece would equal 960 pages of briefing. In contrast, under LCvR 56.1(a), Defendants would be entitled to 12 motions, resulting in up to 720 pages of briefing (12 x 60).

The State has made the following proposal regarding the handling of motions for summary judgment in this case:

1. Defendants' motions

- 1 joint common issues motion for summary judgment not to exceed 75 pages
- 7 individual issues motions for summary judgment by corporate group not to exceed 10 pages each
- Date certain for filing for all motions for summary judgment -- May 18, 2009³
- 30 days for State to respond to joint common issues motion for summary judgment
- Time regarding responses to individual issues motions for summary judgment per LCvR 7.2
- Time for replies for all motions for summary judgment per LCvR 7.2
- Response to joint common issues motion for summary judgment not to exceed 75 pages
- Response to individual issues motions not to exceed 10 pages each
- Page length of replies for all motions for summary judgment not to exceed 40% of original motion

2. State's motion

- 1 motion for summary judgment not to exceed 75 pages
- Date certain for filing motion for summary judgment -- May 18, 2009
- 30 days for Defendants to respond to State's motion for summary judgment
- Response to State's motion for summary judgment not to exceed 75 pages

³ Under the current scheduling order, Defendants' final expert report is not due to be disclosed until May 30, 2009. The State has filed objections to this scheduling order. *See* DKT #1757. To the extent all or part of the current scheduling order is not reversed as the State believes it should be, under the State's proposal here, any sampling results not provided to the State in advance of May 18 or expert reports disclosed after May 18 would not be able to be used for summary judgment purposes.

- Time for reply for State's motion for summary judgment per LCvR 7.2
- Page length of reply for State's motion for summary judgment not to exceed 40% of original motion

III. Argument

A. Defendants' proposal is excessive

While *some* accommodation should be made in the length of the briefs allowed to ensure that the common issues in this case are fully presented in a coordinated manner, Defendants' suggestion that they be allowed nine 25-page common-issues motions is excessive and without merit.

Under LCvR 56.1(a), each of the 12 Defendants would be entitled to one 25-page motion for summary judgment, and each Defendant's motion would have to cover the entire range of issues that that Defendant desired to raise on summary judgment.⁴ On this the two sides apparently agree: it obviously does not make sense for each of the 12 Defendants to brief the same common issues in each of their respective 25-page motions for summary judgment. Such an approach would be repetitious and not an efficient use of the Court's or parties' time. By the same token, however, Defendants have offered and can offer no valid justification for needing *nine times* as many pages for their common issues summary judgment motion than they would otherwise be entitled to under LCvR 56.1(a) for common issues *and* individual issues together.

⁴ Thus, Defendants' suggestion that the State's proposal would "halv[e] Defendants' page limits while tripling its own" demonstrates a misunderstanding of the rules and is wrong. *See* Motion, p.7. Under a correct understanding of the rules, the State's proposal would triple the number of pages *both* sides would have to raise common issues. Meanwhile, Defendants' proposal, putting aside the individual issues motions, would increase Defendants' page limits nine-fold while not increasing the State's page limits at all. Thus, it is Defendants' proposal, not the State's, that is "obviously unfair and one-sided." *See* Motion, p. 7.

Thus, Defendants' characterization of their proposal as "a slight relaxation" of the rules is absurd.
See Motion, p. 3.

Seventy-five pages per side for common issues motions for summary judgment, as proposed by the State, should be more than enough. The experiences in the *City of Tulsa v. Tyson Foods, Inc.* litigation -- a case founded on similar conduct as that alleged against Defendants here -- are instructive. In *City of Tulsa*, the poultry defendants were granted leave to file a 60-page common issues motion for summary judgment, *see* DKT #200, while the plaintiffs in that case were granted leave to file a 55-page common issues motion for summary judgment. *See* DKT #213. The following chart reflects the number of pages of briefing on the common issues by the two sides.

Common Issues Motions for Summary Judgment in *City of Tulsa*

<u>Side</u>	<u>Motion</u>	<u>Response</u>	<u>Reply</u>	<u>Total</u>
Poultry Defendants	57 pages	50 pages	29 pages	136 pages
City of Tulsa Motion #1	27 pages	29 pages	10 pages	66 pages
City of Tulsa Motion #2	23 pages	38 pages	10 pages	71 pages

Defendants propose increasing the 60 pages allowed for the defendants' common issues motion in *City of Tulsa* to 225 pages for their common issues motions here -- almost a four-fold increase. On the other hand, the State's proposal of 75 pages per side for common issues expands upon the number of pages that were allowed in *City of Tulsa*, but not excessively, and ensures that there will be more than enough space to adequately present legitimate issues.

There are, of course, reasons for page limits on motions. They conserve limited judicial resources, forcing movants to focus their arguments and move on only those issues for which

there is a legitimate basis for the motion. *See, e.g., Laurenzaon v. Blue Cross & Blue Shield of Massachusetts, Inc. Retirement Income Trust*, 134 F.Supp.2d 189, 197 fn 3 (D. Mass. 2001) (" . . . Blue Cross was mistaken to believe that it could accomplish more with forty pages than it could with twenty. To the contrary, the discipline of page limitations might have persuaded Blue Cross to scrap its weaker arguments and focus on those arguments with more promise. In the law, as in poetry, quality most often varies inversely with quantity."); *Tabankin v. Kemper Short Term Global Income Fund*, 1994 LEXIS 965, *5 (N.D. Ill. Jan. 31, 1994) ("[Defendants'] shotgun approach violates the traditional wisdom that lawyers should determine which of their arguments are the strongest and pursue them with vigor while discarding weaker arguments. The traditional wisdom has earned that status because it is sound advice. We do not favor the shotgun approach, as it imposes upon the Court the task of winnowing the wheat from the chaff, a task that should have been done by the movant's attorney.").

Again, reference to the *City of Tulsa* experience is revealing. In *City of Tulsa* there were six poultry defendants. The six poultry defendants filed seven separate motions for summary judgment -- six individual motions and one joint motion. Collectively, these motions raised some 17 separate issues. *See City of Tulsa* DKT #211, #216, #219, #229, #232, #238 & #239. Evidence that the poultry defendants' motions were more shotgun than rifle can be found in the fact that the Court, in a comprehensive 77-page opinion, granted summary judgment on only two of these 17 issues.⁵ *See City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp. 2d 1263 (N.D. Okla. 2003), *vacated in connection with settlement*. Thus, for their scores of pages of summary judgment briefing, the poultry defendants in *City of Tulsa* achieved precious little in terms of

⁵ These two issues are readily distinguishable under the law and facts applicable to the present case.

narrowing the issues for trial, while at the same time they consumed significant judicial resources. There is no reason to expect that the hundreds of additional pages of briefing (over and above that allowed in *City of Tulsa*) sought by Defendants here would in any way "streamline the issues presented to the Court in pretrial motions and at trial." *See* Motion, p. 3. Simply put, 75 pages per side for common issues should be more than enough to present by motion those matters on which one side or the other contends that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56.

Likewise, Defendants' proposal for seven individual issues motions for summary judgment, up to 25 pages apiece, is excessive. Were this a typical case, it bears repeating, each Defendant would have to present all of its common issues *and* all of its individual issues in a single 25-page motion. *See* LCvR 56.1(a). The State's proposal of a 10-page individual issues motion per defendant group is, therefore, entirely appropriate. Moreover, it is not inconsistent with the *City of Tulsa* experience. As the following chart indicates, the *City of Tulsa* poultry defendants' individual issues motions averaged about 14 pages a piece (an average that would be much lower but for the fact defendant George's filed a 24-page individual issues motion).⁶

Individual Issues Motions for Summary Judgment in *City of Tulsa*

<u>Defendant</u>	<u>Motion</u>	<u>Response</u>	<u>Reply</u>	<u>Total</u>
Cargill	8 pages	10 pages	10 pages	28 pages
Simmons	11 pages	9 pages [†]	5 pages	25 pages
Cobb-Vantress	8 pages	9 pages [†]	5 pages	22 pages

⁶ All of the poultry defendants' individual issues motions were denied. *See City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp. 2d 1263 (N.D. Okla. 2003), *vacated in connection with settlement*.

Tyson Foods	8 pages	9 pages [†]	5 pages	22 pages
Peterson	13 pages	6 pages	3 pages	22 pages
George's	24 pages	17 pages	5 pages	46 pages

[†] The plaintiffs in *City of Tulsa* responded to the individual issues motions by Simmons, Cobb-Vantress and Tyson Foods in a single 9-page response.

B. Defendants' proposal is unnecessarily burdensome

Adoption of Defendants' proposal would result in both the Court and the State being buried with paper. As noted above, Defendants' proposal would result in up to 960 pages of briefing with respect to Defendants' motions alone. It would encourage the filing of motions for summary judgment that have no chance of success and that would needlessly consume the time of the Court and the State. Moreover, Defendants' proposal that its filings be allowed to occur on a rolling basis over the next several months fails to take into account the fact that the two sides are in the midst of intense expert discovery on liability and damages issues, and at the same time are attempting to wrap up fact discovery.⁷ Requiring the State to divert its resources to respond to a torrent of defense motions for summary judgment would be disruptive of the State's on-going collection of evidence⁸ (some of which may be needed to respond to one or more of such motions, *see* Fed. R. Civ. P. 56(f)) and unfair. Finally, Defendants' proposal contemplates inefficient piece-meal treatment of the issues in this case, thereby requiring multiple hearings and rulings by the Court over the next several months as Defendants' motions roll in. The State

⁷ Defendants' statement that the rules permit a party to move for summary judgment at any time is true, but must be viewed in the context of the Local Rules which contemplate the filing of a single motion for summary judgment per party. Here, Defendants propose each party, individually and collectively, be permitted to participate in up to ten motions for summary judgment.

⁸ Defendants have not even completed the disclosure of all of their expert witnesses.

submits that a single hearing on all the issues,⁹ resulting in a single opinion and order, would be the most efficient use of the Court's and the parties' time.

IV. Conclusion

WHEREFORE, premises considered, "Defendants' Motion Regarding Summary Judgment Briefing" [DKT #1823] should be denied and the State's proposal regarding summary judgment briefing, *see* Exhibit A to DKT #1823, should be adopted.

Respectfully Submitted,

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